

EXHIBIT “26”

LEXSEE 1992 U.S. DIST. LEXIS 3253

**IN RE: THE COLUMBIA GAS SYSTEM, INC. and COLUMBIA GAS
TRANSMISSION CORPORATION, Debtors. THE OFFICIAL
COMMITTEE OF UNSECURED CREDITORS OF THE COLUMBIA GAS
TRANSMISSION CORPORATION, Appellant, THE COLUMBIA GAS
SYSTEM, INC. and COLUMBIA GAS TRANSMISSION CORPORATION,
Appellees.**

Civil Action No. 92-127-SLR

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
DELAWARE**

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March 10, 1992, Decided

PRIOR HISTORY: [*1] Chapter 11, Case Nos.
91-803, 91-804

LexisNexis(R) Headnotes

COUNSEL: James L. Patton, Jr, Esquire, of
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Delaware, attorney for Debtors and for Appellees
The Columbia Gas System, Inc. and Columbia Gas
Transmission Corporation.

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Gross, Wilmington, Delaware, attorney for
Appellant The Official Committee of Unsecured
Creditors for the Columbia Gas Transmission
Corporation.

JUDGES: ROBINSON

OPINIONBY: SUE L. ROBINSON

OPINION:

MEMORANDUM OPINION

ROBINSON, U.S. District Judge

INTRODUCTION

Pending before the Court is the emergency motion of the Official Unsecured Creditors Committee of the Columbia Gas Transmission Corporation ("the Committee") for stay pending appeal ("the motion"). The Committee has filed an appeal of the February 13, 1992 order of the Bankruptcy Court approving, inter alia, payment of "category one refunds and prepetition GRI surcharges on a pro-rata basis . . . to the extent of \$ 3.3 million." Said order is based upon the Bankruptcy Court's conclusion that the "category one refunds and prepetition GRI surcharges" are not property of the Debtor's bankruptcy estate, rather, that said refunds and surcharges when received [*2] are held by the Debtor "in trust" for the benefit of its customers.

The Committee bases its motion on two arguments. First, the Committee contends that, pursuant to Bankruptcy Rule 7062, which incorporates *Fed.R.Civ.P. 62(d)*, it is entitled to a stay as a matter of right so long as suitable means are implemented to protect non-appealing parties from any loss occasioned by a stay. In this case, the Committee argues that the Debtor's retention of customer refund monies in an interest bearing escrow account insures that neither the Debtor nor its customers will be harmed by a stay. Alternatively, the Committee argues that a stay is warranted pursuant to Bankruptcy Rule 8005

because the Committee has satisfied all the requirements for such discretionary relief.

Responses in opposition to the motion have been filed by Columbia Gas Transmission Corporation (the "Debtor"); West Ohio Gas Company, Virginia Natural Gas, Inc. and the Peoples Natural Gas Company; the Columbia Gas Distribution Companies; The Official Committee of Customers; and the Pennsylvania Public Utility Commission. For the reasons that follow, a stay will be granted pending an expedited appeal.

DISCUSSION [*3]

This Court has jurisdiction pursuant to 28 U.S.C. § 1334(b). I conclude that the issues at bar are primarily legal in nature and, therefore, subject to de novo review. *In Re Public Service Co. of New Hampshire*, 116 Bankr. 347, 349 n.2 (Bankr. D.N.H. 1990).

With respect to the Committee's first argument for relief, I decline to hold that the Committee is entitled to a stay as a matter of right. The Committee has not posted a bond, as required by *Fed.R.Civ.P.* 62(d). I find no support for the proposition that the Debtor, the prevailing party below, be required to place into escrow funds judicially determined to belong to its customers, in order to afford the Debtor and its customers protection against any loss as a result of the Committee's appeal.

The Committee submits that it is nevertheless entitled to a stay pending appeal pursuant to Bankruptcy Rule 8005. In order to obtain a discretionary stay, the Committee must demonstrate that: 1) it is likely to prevail on the merits of its appeal; 2) it will suffer irreparable injury absent a stay; 3) a stay will not cause substantial harm to other interested parties; and 4) a stay will not harm the public interest. [*4] See, e.g., *In the Matter of Delaware & Hudson Rv. Co.*, 90 Bankr. 90, 91 (Bankr. D.Del. 1988). The Court will examine each of these four factors seriatim.

Probable Success on the Merits

The Court concludes that the Committee has carried its burden of demonstrating the first factor, probable success on the merits. Probable success on the merits means that "the movant has a

'substantial case,' or a strong case on appeal." *In Re Public Service Co. of New Hampshire*, 116 Bankr. at 349. There is no dispute that the issues presented are novel and complex. I have concluded that the issues are entitled to de novo review. I, therefore, embrace the observations of the Court in *In Re Mader*, 100 Bankr. 989, 991 (N.D.Ill. 1989), as follows:

This Court does not intend to go so far as to actually determine the merits of the legal issues which will be presented on appeal. Suffice it to say, however, that we have not found, nor been cited to, any controlling authority on this precise question, and the novel legal issue presented is not one in which the debtor has no likelihood of success. This case will [*5] likely present an issue of first impression and, on balance, the likelihood of success on the merits does not appear to weigh too heavily in favor of, or against, any of the parties to this proceeding.

See also *In Re Gleasman*, 111 Bankr. 595, 601-02 (Bankr. W.D.Texas 1990).

Irreparable Harm

The Court finds that the Committee has carried its burden as well as to the irreparable harm factor. It is apparent that, absent a stay, the funds subject to the Bankruptcy Court's February 13, 1992 order will be disbursed to the Debtor's customers. In dispute is the question whether there is a mechanism in place to recover such funds in the event the Bankruptcy Court's order is reversed. I decline to resolve that question on the record before me. Given the complexity of the question, however, I conclude that the irreparable injury factor weighs more heavily in favor of granting the stay pending an expedited appeal.

Harm to Other Parties

The parties filing in opposition to this stay argue that a stay exposes the Debtor "to the

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unnecessary risk of diminution of the estate due to interest payments and substantial tax liability that could be easily [*6] avoided if [the Debtor] timely flows through the refunds." (D.I. 6 at 19) Accepting such representations as accurate, I nevertheless conclude that the interests of the Debtor and the bankruptcy estate can be accommodated by an expedited appeal.

Public Interest

Although the Court acknowledges that the refund of overcharges to individual customers represents a significant public interest, as does the

public interest in enforcing the laws promulgated by Congress, I conclude that the public interest will not be adversely affected if the stay is granted pending an expedited appeal.

CONCLUSION

For the reasons stated, the Court will grant the Committee's emergency motion for stay pending appeal.

An appropriate order will be entered.

SUE L. ROBINSON